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ABSTRACT

A maximum-access cable television system will eliminate some legal and regulatory problems and introduce others. The operator of a system will no longer be responsible for and in control of what is transmitted over his system. With access unlimited and unrestricted, such regulations of content as the "fairness doctrine" and "equal time" become unnecessary, although "right to reply" will still be necessary; new rules must be derived to deal with it in the new situation of unlimited access. Origination by persons or groups who are too poor or too controversial to obtain access in the current system raises the problem of financial and legal responsibility for injury which their broadcasts might cause. However, the narrowing scope of libel, sedition and pornography laws, home console "locking" against certain types of programs, and free access for reply all lessen this problem. A system of compulsory insurance could cover the remaining cases. Finally, privacy will be a difficult problem with free-access cable systems, but as it becomes a problem for everyone, the law will develop to guard privacy. (RH)

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FORESEEABLE PROBLEMS IN A SYSTEM OF MAXIMUM ACCESS

by

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A Report Prepared for the
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Last summer, after the cable franchise proceedings before New York City's Board of Estimate, Fred Friendly said, "These conduits will determine what kind of people we are." 1/

By many measures the eras of man may be understood as products of his means of communication.2/ We became men with our ability to reduce individual experience to the spoken word, freeing successive generations from the need to repeat the learning experiences of their ancestors. Recorded history began, and thereafter shaped our lives, with the advent of the written word. The capacity for democratic participation in social decision-making dates from the generalized use of printing, the beginning of mass communication. More recently electronics have introduced a means of mass communication whose effect on "the kind of people we are" is still being debated, but no one debates whether that effect is profound.

Until the advent of cable, however, electronic mass communication has been limited by the capacity of the

electro-magnetic spectrum. Like written communication before printing, therefore, it has been controlled by an elite. What cable makes possible -- in addition to the popularization of many new uses for electronic communication, such as facsimile printing, computer access, and the transaction of commercial affairs -- is the freeing of electronic mass communication from the elitism of spectrum scarcity.

The way in which "these conduits will determine what kind of people we are," therefore, will very much be a consequence of decisions that determine who has access to them -- who can see and hear what they offer, and who can do and say what they make it possible to communicate. It is not necessarily true that the structure of the new cable industry will automatically provide uninhibited access, either to viewers and listeners or to doers and speakers. Nor can we be sure that society will find such free access desirable. Technologically, however, such an open system is attainable and the function of this paper is, therefore, to try to anticipate the social problems that uninhibited access would create, and the policy options available for dealing with them.

In order to analyze the risks and consequences of a system that maximizes access, it will be useful to imagine a model designed to achieve that goal. 3/ Such a model

would provide maximum access both to "subscribers", seeking primarily to receive what the system offers, and "originators", who would want to broadcast their messages or to put them into storage for subscriber retrieval. Of course, subscribers in addition to receiving may need to put signals into the system to express choices among a variety of offerings, and might be asked by originators to express their responses to questions and to commercial offerings. Thus subscribers would not exclusively receive messages and conversely, originators would sometimes be the receivers. Moreover, for such purposes as computer data storage and manipulation, the user will at once be a subscriber and an originator. In any event, if the system achieves maximum accessibility, any individual will be a subscriber or an originator at will: neither role will describe an elite.

Using the hypothetical model as a base, it should be possible to analyze the system's risks and consequences, and the policy options available to deal with them -- including those options which require modification of the hypothetical structure itself.

I.

The model assumes the installation of consoles, which would combine elements of our present telephones, computer

teletypewriters, television screens and a facsimile printer, in subscribers' homes and offices. These would be available to the subscriber, at his option, on a rental basis or for purchase. Through this instrument he would be able to obtain one-way switched access to current real-time video offerings (conventional TV programs), video tape and microfilm libraries, computer memories, banking and other commercial services, and facsimile reproduction of periodicals, books and personal mail, all controlled by the existing, two-way, switched telephone system. This access would, among other things, give him what he presently obtains from his television and radio set, his telephone, post-office services, movies, magazines, newspapers, and those shopping and banking services now available by mail. But its greater efficiency and flexibility should greatly expand his use of all these services, as and when volume brings costs down to levels that will make them attractive.

The cable operator will function in this system as a common carrier, required to provide facilities at reasonable rates to all who want to be subscribers and originators, in quantity reasonably adequate to meet demand. The operator will be legally prohibited from originating communications over the system and from controlling any use, except to apply uniform requirements necessary to the operation of

of the system, such as regulations for technical compatability of equipment attachments or to establish the credit of applicants. The operator's price to subscribers will reflect the transmission costs of each message and, possibly the console rental. The operator's price to originators, who may wish to broadcast or to place copyrighted material in storage for later consumer-access, will reflect only origination cost, and possibly studio rental and storage. In addition, the operator's billing system will permit the originator to set any price he chooses on proprietary material, with the operator acting as collector. Advertiser-sponsored material will be available to the subscriber side-by-side with subscription-payment material.

The maximum-access model system would be designed to separate the business of originating messeages from that of message transmission in order to maintain effective competition in the former. 4/ Within this system, moreover, consumer sovereignty should replace advertiser sovereignty over the marketability of messages. Equipment manufacture and distribution would likewise be divorced from the businesses of message origination and transmission. Finally, the structure should be designed to build in such competition as may be achieved among the cable operators themselves; in areas of sufficient population density broadband transmission systems might compete with one another, and the coexistence

of independent cable operators in different communities would provide a "yardstick" type of competition assisting the more effectiv e regulation of the common carrier systems. Antitrust laws would be fully applicable and tight multiple-ownership rules would keep control of the cable carriers in the hands of what, in the language of telephone regulation, are called "independents"; there would be no Mother Bell among cable operators. As in the case of the present telephone system, technical compatability and interconnection between systems would be mandated. Thus, networks for any geographic area, large or small, could be organized by message originators. The individual cable system would likewise be capable of essentially unlimited subdivision, so that an originator's message could be targetted to small audiences isolated either geographically (i.e., by neighborhoods) or demographically (i.e. by interest, occupation or similar factors). Excess transmission costs occasioned by assemblying other than system-wide audiences would be originator borne. Thus, although the simultaneous use of one channel in the system for several less-than-system-wide audiences would yield economies in overall transmission costs that should be passed on to originators, it would do so only at a price in the expense of subdividing the audience which will reduce the rate reduction the originator enjoys.

A partial subsidy of subscriber connection would insure that the poor, and even the affluent resident who elects not to pay for it, would be able to receive the kind of communications that are essential to a sense of community. The cable operator would be required to offer and maintain, without charge, 100% subscriber connection throughout his franchise area to channels on the operator's broadband system that are devoted to educational usage, municipal services, political and nonprofit originations, and perhaps even other services, such as first class mail. Such "free" service would stop short at entertainment and sports broadcasting, and commercial and banking services. The subscriber who sought no more, provided he already owned a television set (through which he could receive the signals of the remaining on-air television broadcasters) and enjoyed present day telephone service, would be a member of the communications community to that limited extent. To obtain the full range of services which the model provides, he would have to become a true subscriber, paying for console rental and transmission charges. Thus, in providing access to the originator, the system would be able to deliver that which would be necessary to make access significant - a potential audience from which no one is excluded for want of the subscription fee. Likewise the more-than-ordinary cost of providing connection for remote and rural subscribers would

be subsidized, on the pattern of the present rural electification system.

At least a portion of these subsidies may be carrier borne. The carrier who is required to place an "electronic salesman" - i.e. free connection for "public" television reception - in every household and office, may recoup the cost of doing so in accelerated sales; as the subscriber experiences the advantages of cable transmission he may sooner become ready to pay the subscription fee that will entitle him to all of the system's services. 5/

At the originations end, access will be limited by financial requirements; no subsidized originators will be given opportunities to broadcast or to put material into storage. Commercial, educational and "public" broadcast and storage producers may, of course, provide a platform without charge to individuals they have selected for their own reasons (and may even pay them honoraria), as at present, but these producers will themselves pay the uniform charges of the cable operator for access to the system. The financial limitation on access for originators, however, should prove to be modest. From the perspective of maximizing access, the need to meet modest charges for channel time will prove to be the least onerous censor. No criteria assigned for an official censor who decides on the eligibility of

originator applicants can function with as much neutrality as a modest financial requirement. The originator who believes his message will attract an audience can invariably raise this small fee from the class represented by potential members of that audience (or sponsors who desire to reach that class with his message), if not otherwise.

Other than to have to pay this charge, the originator should find access unlimited. All applicants will be offered time in convenient segments on a first-come, first-served basis. Each will be entitled to rent studio facilities from the operator or to provide his own by purchase or rental from independent suppliers. By virtue of the operator's capacities on an individual channel basis to subdivide his system and to interconnect, the access which the originator obtains may at his option be to the entire system, to a specialized audience within it, to a local, regional or national network audience, or to some combination of these, all at rates varying with the actual costs involved.

II.

A major consequence for public policy of the development of a system of practically unlimited access will be its freedom from need for anything like the present system of broadcast regulation. That system, which involves official

licensing of originators and control of message content, finds its justification in characteristics of the present broadcasting medium that are opposite to those of a maximum-access medium. Whether stated in terms of potential for electronic interference, the scarcity of broadcast frequencies, or public ownership of the electromagnetic spectrum, justification for such official influence upon the content of mass communications could not be found within American constitutional limitations but for the facts (1) that access to the medium is inherently limited and (2) some system of assigned frequencies is essential to the existence of any intelligible communication on the medium at all. Hence, though there will be regulation of the system of cable communications, both the nature of the need for regulation and the nature of our constitutional traditions will insure that it will be a radically different system of regulation.

The probability of local monopoly (or oligopoly), as well as the use of public streets and rights-of-way, will require regulation of the cable operator. But the divorce of message transmission from message origination will leave the business of origination outside of the rationale for regulation. The character of regulation, therefore, may be as different as present day telephone and wire service supervision is from that of broadcasting. The actual business of the operator, relating to rates and quality of service,

will be subject to regulation. But essentially all of the business of message origination, now the source of the most intractible problems in broadcast regulation, will be outside the scope of the new regulatory scheme.

First, it will no longer be open to regulators to pass judgment on the adequacy of an originator's programming proposals to meet the needs of his community and to serve the public interest -- routine steps in the present system of licensing broadcast originators. 6/ There will be no occasion for regulators to examine the originator's actual programming, either for conformity to earlier programming proposals or otherwise. Except for anti-trust considerations, the sources of his programming, whether local, "network" or other, should be of no concern to any officials of government. Whether there is "balance"in his offerings, say, between the needs of the public for entertainment and for news and public affairs, should be of no moment to officialdom; whatever publicly felt needs one originator does not supply should ultimately (and more surely than under the present system of regulation) be provided by someone else. Consumer sovereignty in a system that is effectively competitive should replace regulation altogether in dealing with these objectives of public policy.

A number of rules under the present regulatory system are designed to assure a limited degree of public access to broadcasting. These are the rules of the "fairness doctrine",[7] of right-to-reply,[8] and of "equal time" to political candidates.[9] They are designed to free viewers and listeners from a total dependence upon the choices made by a limited number of licensed originators for the range of "ideas and experiences"[10] which they may receive; at least they purport to be so designed. They require a broadcaster to make a fair presentation of all responsible views on controversial issues of public importance, to provide the victim of a personal attack or an unfavorable political editorial with a right to reply, and to afford a political candidate whose opponent has had the use of broadcasting facilities an equal opportunity to use the same facilities. On their face they are eminently fair and proper; they are the least that a system of regulation can offer for the protection of those who are excluded from control of a necessarily limited number of broadcast frequencies.

In fact these rules are the least satisfactory of all of the aspects of broadcast regulation. The agency charged with promulgating and administering them has been unable to provide consistent answers to such questions as: what are controversial issues of public importance; when has the originator presented all responsible views on them; what

quantity of responsive time is required, especially when repetitive broadcasts are involved; and what sanctions are to be employed when violations have occured. [11] Decisions as to what constitutes a personal attack have been subjective and delayed in forthcoming. [12] And the political broadcast rules, far from insuring vigorous political debate, have so limited the use of the medium to well-heeled candidates that the most consistently proposed remedy has been their suspension.

A system of maximum access, with message origination completely divorced from message transmission, should permit the objectives of rules such as these to be achieved almost without regulation. With neither the owners of the medium nor the regulators standing astride the means of access, no rules at all should be necessary to ensure access to all sides of issues of public importance. No judgments, save the private judgments of individuals to seek access, should be needed to determine what are publicly important issues, what views on them are worthy of airing, what time should be alloted to each and what sanctions must be employed to insure fairness. Though the capacity to buy time for originations will give the wealthy an advantage, modest rates and a common carrier approach will prevent that money from squeezing out the voices of less well-financed spokesmen. Just as the impecunious author may today find a publisher

and a market for a book that people are likely to read, so under a maximum access system a broadcast originator can expect to find financial support for any ideas that will attract an audience. Moreover, he should be able to do so even without the somewhat rare skills of literacy often required of authors.

So, too, the political broadcast rules will become obsolete in the era of maximum access. Essentially a common carrier's legal obligation will require the cable operator to do for all would-be message originators what the "equal time" rule now requires broadcasters to do only for politicians. More than that, the common carrier obligation leaves the cable operator no option to avoid political broadcasts (or a particular political contest) altogether -- unlike the "equal time" rule which is triggered only by a broadcaster's wholly optional decision to air one candidate in a contest. Because of modest rates, it should be possible for any serious candidate for any office to expose both his views and his personality, fully and thoroughly, to the electorate. Moreover, with variable audience subdivision and interconnection available from the cable operator, each candidate should be able to address those members of his constituency willing to listen, throughout its entire territory, without wasteful purchase of access to excess audiences.

Only the right-to-reply rules -- or some variation of them -- may be needed in the era of maximum-access cablecasting -- to serve objectives of the kind that they serve at present. While the object of a personal attack could be limited to purchasing channel time to reply, in the same manner as that in which every other member of the community may purchase time for any purpose whatsoever, two factors militate against that laissez faire approach. The object of an attack is, by definition, the only participant in this particular public controversy, this attack on him, who did not initiate his own participation. (Thus, in the attack which gave rise to the Red Lion Broadcasting Co. litigation, [13] Fred Cook had prior to the attack been a participant in controversy over Barry Goldwater's qualifications for the presidency. By virtue of the attack, however, a new controversy had been generated, to-wit, Mr. Cook's integrity as a reporter. Involuntarily Cook was a participant in that controversy, too.) The need for the object of the attack to speak out thus arises because someone else has singled him out, and he has a right to defend himself. [14]

Secondly, in all fairness, he should have more than a normal chance with his reply to reach the same audience, as nearly as can be, that heard the original attack. No system, of course, can guaranty that the individuals who

chose to view channel 41 at 9:00 p.m. on one night will still be switched on to that channel the next night, or one week later. But some regularity of programming in the new era, as at present, is likely to produce some regularity in viewing habits. If the object of the attack is required to purchase reply time from the cable operator on the same basis as any other customer, that is, first-come, first-served, he is unlikely to be awarded time even on the same channel as that of the attack, much less at the earliest available corresponding time in some regular program sequence.

For these reasons, some special rules to protect a right of reply to personal attacks seem indicated. The basic policy options are two: to impose the obligation to provide reply time on the operator or to impose it on the message originator responsible for the attack. Only the operator will invariably control the channel time necessary to give the person replying access to an audience most nearly identical with that which heard the attack. But imposition of the obligation on the operator would be inconsistent with the common carrier principle which denies him any control over message content; if he cannot prevent the attack, then he can in fairness hardly be saddled with a duty to provide time to reply.

Short of abandoning, or qualifying, the operator's common carrier obligation to keep his hands off message content, therefore, the only realistic alternative seems

to be to impose the duty to provide reply time on the message originator. In some cases the originator will control access to the ideal reply time; for instance, a commentator or an entertainer appearing regularly at the same time each day or week will be in that position. In that event, he can discharge the reply-time obligation directly, himself giving the object of the attack access to the most suitable time segment. In all other cases, he should be required to purchase such time for the victim, with the operator being required to do no more than vary his normal, first-come, first-served, principle to the extent necessary to make available for this purchase the ideal reply-time slot. To discharge this obligation, the operator might be required to condition all of his time-sales contracts with a right of preemption in favor of the originator required to purchase reply-time on behalf of a personal attack victim. Then, with some imposition on the operator and on other purchasers of time on the system (but without financial burden on either of them), the actor responsible for the attack should be capable of doing equity to his victim when so directed by properly constituted authority; the originator may be ordered to purchase reply time for the object of his attack on the channel and in the time-segment that promises to deliver an audience as nearly identical as can be achieved to that which heard the attack.

In sum, then, a very significant consequence of achieving a maximum-access system of electronic mass communication will be the nearly total elimination of a host of rules and procedures for regulating the present system of electronic mass communication. Substantively, these rules have been at war with our "freedom of the press" conceptions of the role of government in mass communications and, administratively, they have proved to be among the least satisfactory of our legal principles. Each proposal to vary the maximum-access system needs to be viewed, inter alia, with its impact upon this consequence in mind.

III.

A maximum-access system does import potential for injury not present in the familiar system of mass communication.[15] However, the major reason for this potential lies in the accessibility of a powerful means of communication to individuals who lack the financial ability to compensate for the injuries they may inflict with that power. In contrast, the present system, because it does not divorce the means of transmission from control over origination, almost invariably requires an investment that is proportionate to the power to injure. The greater power of a metropolitan daily to injure than, say, that of a suburban weekly or an underground newspaper, is almost totally a function of

circulation and readership; yet one can be sure that the investment of each is greater as its circulation and readership becomes greater. [16] If the television broadcaster in the metropolitan market possesses even greater power to injure (because of the immediacy and impact of his medium, as well as the extent of his audience), we may be sure that his investment will be still greater. The number of occasions on which metropolitan dailies and television broadcasters are held liable for injuries to others are few, but the potential for liability powerfully inhibits the transmission of legally cognizable, [17] injurious messages.

The common carrier model here assumed for cable presupposes that the operator, the only actor with a necessarily large investment, will have neither control over nor responsibility for the message transmitted. If individuals are injured by defamation or fraud in the message, civil liability may be imposed on the originator but not on the operator. Likewise if public injury in the form of pornography, the transmittal of gambling or other unlawful information, sedition, and incitement to violence or crime, occurs, criminal sanctions may be imposed only on the originator. With respect to both classes of legal injury, the absence of financial stake relieves the originator of a major inhibition. The impecunuous originator may be considerably harder to reach

with both civil and criminal sanctions; not only may a judgment for damages against him be worthless, he may find flight and the avoidance of criminal sanctions easier as well.

The maximum access model at the same time will possess a mitigating factor not present in today's system. Most injuries done by communication can be reduced by counter-communication; defamation can be mitigated by reply, fraud can be undone by truth, the effect of incitement may be reduced by official and other response. Insofar as the maximum access model is available for response by spokesmen for the potentially injured, especially if that response can be prompt, the extent of injury is capable of being reduced.

Two developments during the nineteen sixties have a further bearing on the extent of the problem. One is decision of the U. S. Supreme Court in New York Times v. Sullivan, [18] and its progeny, essentially eliminating liability for defamation of public officials and public figures in the absence of intentional defamatory falsehood or a recklessness that approaches it. The other is the movie classification system, which has practically eliminated the laws of obscenity as a restraint on adult film entertainment in return for a classification procedure that limits the accessibility of some films to minors. Both considerably narrow the area of protection from the injuries of defamation and pornography that must be provided for.

Within these limits, however, there is an irreducible minimum of exposure to the injuries of defamation, fraud, obscenity, sedition, incitement and the dissemination of gambling and other illegal information, that is occasioned by the introduction of a maximum-access system. The problems are how to reduce to, or hold at, an acceptible level the risks of: (1) lack of financial responsibility in the perpetrator sufficient to compensate injured individuals, and (2) the commission of crimes that are occasioned by accessibility for individuals who are relieved of the inhibitions of having a financial stake.

The policy options available to deal with these risks seem to me to fall into three classes. The first involves a decision essentially to accept the risks, subject to adaptations designed to reduce them without reducing the basic accessibility of the medium. At the opposite pole, the system may be modified to interpose operator responsibility for content between the originator and the transmission of his message, rendering negligible the risks of injury but fundamentally changing its accessibility. Between the two, a system of compulsory or social insurance may be possible, minimizing risks of injury while adding only financial limitations on accessibility.

Acceptance of the risks, at least with respect to some categories of injury, may on analysis be more practicable

than the catalog of them suggests. Civil and criminal sanctions do inhibit, even in the case of individuals too poor to have much to lose. And, as an alternative to imposing responsibility on others than the originator, they have the merit of encouraging the sense of individual responsibility upon which a free society depends.

In the case of defamation, the harm to an individual victim caused by his inability to collect a libel judgment must be viewed as serious and substantial. But the likelihood of this occurring may really be quite small. A public figure is entitled to recover for defamation only if he is a victim of an actually malicious, defamatory falsehood. When such a libel does occur, the public figure is likely to need an opportunity to vindicate his reputation more than money damages. Even the uncollected libel judgment provides him this vindication and, what is considerably more important, the enlarged opportunity for reply which the maximum-access systems provides him may well justify a conclusion that the system has reduced the real hazard of injury.

The non-public figure, conversely, is an unlikely target for an intentional defamation. The greater probability of libel for him is from such accidents as a news report which misidentifies him as a participant in some crime or scandal. This risk is one which he bears, not uncomfortably, in today's system of mass communication and it is one brought

about not by the rantings of impecunious polemicists but by the activities of what will normally be an adequately-financed newsgathering organization. Policy makers might well be justified in looking to experience with the maximum-access system before building in restraints designed further to minimize these risks.

The risks of commercial fraud are less easily minimized. Especially with a system which permits commercial transactions to be conducted electronically, and on the spot, the risks of consumer fraud by a message originator who is financially irresponsible, or who simply folds his tent (or quick money) and quietly steals away, are great. It is unlikely that decision makers will find these risks at all acceptable.

At the same time, the accommodations required to minimize these risks can be confined so as to minimize their impact upon access to the system generally. Primarily the problems of commercial fraud call for remedies that are independent of the system of communcations. The need to restrain misleading advertising, for instance, has been present whatever our means of communication; the maximum-access system may do no more than enlarge the number of advertisers who must be restrained. (It will, however, by-pass a number of extra-legal screening devices that operate at present: the NAB Code and the advertising acceptability departments of many newspapers, for instance.) Legal remedies for consumer protection

that are being developed in today's context may have counterparts that will be as effective in the cable era; thus, the imposition of a three-day right to revoke on consumer contracts with door-to-door salesmen might well be extended to electronic contracts. So extended, it will be easier to enforce, for money which is deposited electronically, unlike cash handed to a door-to-door salesman, can be required to be held (by the bank needed to receive it) during the period of revocability. Finally, if resort to insurance or a requirement of financial responsibility is felt to be necessary to deal with commercial fraud, it should be possible to segregate commercial uses of the system -- especially use to conduct commercial transactions on it -- from others in order to prevent these resorts from inhibiting other kinds of access.

With respect to the crimes of incitement, sedition, and the transmission of illegal information, the first judgment to be made again is how much will the maximum-access system have enlarged the risk. That it has made an instantaneous audio-visual communication, which penetrates homes and offices, accessible to those with less financial stake than today's television broadcasters have, is the focus of our attention. One can imagine the problem in the form of a neighborhood originations studio taken over as the command post in a deliberately enginered ghetto riot. Incitement

to violence and command over its direction, deliberate undermining of constituted authority, and information as to how to manufacture molotov cocktails and where to find explosives, will be the substance of the programming -- for a while. But the time required for police to interrupt such a continuity will be short.

Moreover, the violent leadership which would so use access to the system is not unable to communicate incitement, sedition and illegal information in today's system. The geographic area to be covered, and the number of people to be reached, for these purposes is not large. Mimeographs, handbills, sound trucks and bull horns will for all practical purposes cover the ground, and walkie-talkies are easily obtained for command purposes. We presently regard the essentially post facto sanctions of the criminal law as adequate to inhibit this kind of communication, and there is good reason to believe that they will be as satisfactory in dealing with the same phenomena in cable communication.

When the geographic area becomes larger, and the numbers in an audience correspondingly greater, the phenomenon is one of a different order. Here the imagination postulates a regional or national network used to exhort to revolution, selective violence, or resistance to the enforcement of specific laws -- such as the draft or the payment of taxes. Command and coordination would not be the functions of cable communication

for more reliable (and more private) means of communication with distant leadership are already available -- for example, coded telephone communication. Stirring a mob to frenzy is not a special problem, for mob reactions in many scattered locations pose law enforcement problems that are not essentially different because they are collective. [19/] The abuse really feared is sedition, the undermining of confidence in constituted authority.

For those who view disaffection and disloyalty as products of speech and agitation, the potential for sedition in an open-access system of cable communications must be taken as great. No multiplier of the audience that hears a single man's words has yet seemed as powerful as television, and the maximum-access model for cable would turn that multiplier over to anyone who was willing, or whose audience was willing, to pay the relatively modest price. The hostility which nearly every major public official has shown to his critics among television commentators attests to the respect paid to the medium by those who have been most successful in manipulating power in a system of popular government. Not uncommonly such officials appear to wish to deny these commentators access to this medium.

The converse of this view, of course, sees official conduct and injustice, or the popular perception of them,

as responsible for disaffection and disloyalty. While speech and agitation may sharpen the perception of injustice, or distort it, the major effect of speech is to correct it. Moreover, even without such correction, this view sees effective speech as a useful outlet for emotions that would otherwise find a more destructive channel. Such "sedition" contributes more to stability than to disaffection.

The long term direction of constitutional law affecting speech has favored the latter view.[20/] As a result, an increasingly narrow area has been left to the law of sedition, though the statutes remain on the books. Decisions affecting cable that incur considerable risk of sedition, in order to preserve maximum access for critical speech of whatever persuasion, will be most consistent with that constitutional trend.

In this connection it should be noted that a practical consequence of relying on the post facto sanctions of criminal law to protect the public from the injuries that may be done by incitement, sedition and illegal dissemination, is that criminal prosecution will normally present in their most clearly drawn form the First Amendment issues of constitutionally protected speech raised by the alleged conduct. Conversely, the interposition of official or operator control between the originator and access to the medium may well make it maximally difficult to test such control by constitutional standards; therefore, much constitutionally protected speech may be denied access.

Lottery and gambling crimes will probably be more easily controlled by criminal sanctions, for they will normally be parts of a continuing enterprise which can be interrupted as well as punished by the criminal law. Sole reliance on criminal sanctions will not relegate their management on the open-access system to locking the door after the horse has been stolen.

The problem of pornographic and offensive utterance arises in two parts. One is represented by the filmed or video-taped show which may be prescreened and classified. The other is contained in the extemporaneous act or remark done on a live performance, which is subject to no prior control. As to both, the present standards of the criminal law, when applied to a medium which penetrates the home to reach all audiences, will probably satisfy almost no one, for they either prescribe too much or too little. A message intended only for adult consumption will be judged by standards which many parents find unsuitable for protection of their children; yet they may find themselves unable to shield their children from it. Conversely, the indiscriminate application of non-adult standards to the all-purpose medium which cable promises to become may not only confine adult consumption to children's standards; it may be held constitutionally impermissible because it does.

With respect to films and video-tapes, a classifications system analogous to that presently used for movies may permit an acceptible discrimination between adult and children audiences. The subscriber's console described in my hypothetical model should normally be fitted with a locking device for many reasons; the console will provide access to personal files in computer storage, to the subscriber's personal mail, and to his bank and charge accounts. Extension of the locking device to control access to contemporaneous entertainment broadcasts and stored video-tape entertainment, will permit householders to control the entertainment shown to minor children (and to themselves). With somewhat more technical difficulty it should, moreover, be possible to cause a classification panel to appear on the home screen prior to the content of an entertainment program even when the subscriber tunes in after the program has begun. Alternatively, program guides to both contemporaneous and stored video-tape entertainment could be required to set forth classifications. To the extent that the householder is willing to rely on the industry's classifications, he will be prepared to unlock only those channels he deems suitable for viewing in his home.

The locking device will be less satisfactory for dealing with extemporaneous remarks on live performances, but it will

be useful nevertheless. It will be unsatisfactory because it will require denial to the family of all offerings on the channels used for live broadcasts, save those individual programs whose originator the householder is confident he need not avoid. But despite such overbreadth, it will effectively shield the family from extemporaneous offensiveness.

For several classes of these risks -- defamation, fraud, incitement and sedition -- the reply and response potential of the maximum-access system may help to mitigate the extent of injury. A modification of the common-carrier principle that requires accommodation of originators on a first-come, first-served basis, would permit reply and response to be more effective for this purpose. If the normal user contract with originators were made subject to preemption for essential responses to earlier messages, in the manner proposed in Part II for replies to personal attacks, 21/ then for a premium rate time might be preempted for an originator who certified that his message was necessary to respond to a previous broadcast. A penalty would apply to inhibit false certificates. Essential responses might include replies to defamatory statements (or retractions by the maker of the defamation, particularly where local law permitted retractions in order to mitigate damages), exposures of commercial fraud, and official responses to inciteful

broadcasts. The point is that time is often of the essence of an effective response and some adaptation of the system to permit such timeliness will enhance the utility of response as a means of dealing with potentially injurious messages.

As I have earlier suggested, the second class of policy options for dealing with these kinds of potential injuries involves abandonment of the basic principle of the maximum-access model, that is, the divorce of the operator from control over and responsibility for the message. Identity of the message transmitter with the entity responsible for message content works well in today's system of mass communications to minimize legally cognizable injuries within the categories discussed in this Part. But it provides only limited access for originators and limited diversity for readers, viewers and listeners.

The options are not confined to full operator control of message content, however, with its concommitant abandonment of the maximum-access ideal and the happy elimination of such official content regulation as oversight of program service and balance, equal time for political candidates, and the fairness doctrine. Short of control, the operator might be required to impose upon all originators uniform requirements of financial responsibility design to compensate all individual injuries occasioned by the broadcast and to serve as bond for the originator's appearance to answer any

ensuing criminal process. These could be satisfied by insurance or by assets and, if they were kept reasonably modest, insurance rates could be hoped for that would be correspondingly reasonable. Insurance premiums, moreover, might be experience-rated in order to minimize the financial burden on originators whose records were free of injury to others.

Perhaps in its ideal form, this system would develop a class of middlemen who, inter alia, would perform the function of providing financial responsibility. Leasing blocs of time from the operator, for which they would contract to be financial responsible, the middlemen would sublease to actual originators whose program proposals satisfied them that the financial risk was acceptible. (The common-carrier obligation of the operator, however, would preclude his bloc-leasing of all available time to the exclusion of independent originators.) To the originator, these middlemen would look like publishers in the magazine industry; instead of having to satisfy a single cable operator who sits astride the originator's total prospect of access to the medium that his message would be legally harmless, the originator could shop around for a middleman whose judgment of the legal risk most pleased him. Best of all, cooperatives might be developed to perform the middleman function for various kinds of originators, especially to meet the financial

responsibility requirements of non-profit originators without economically exploiting them.

But none of this is maximum-access communication. Insurance premiums added to the cost of originating necessarily foreclose some originators and discriminate against those lacking the individual financial means of satisfying minimum requirements. Experience-rated premiums are susceptible of abuse by insurors who may choose, for instance, to settle high-risk claims of doubtful liability at the expense of the future premium liability of the insured. Several competing middlemen are better than a single operator who controls access, but they may be very little better, when viewed from the perspective of accessibility, than today's several competing television broadcasters. Each increase in the financial threshold to access moves in the direction of re-establishing the need for today's unsatisfactory rules regulating the content of broadcasting. And each of them reduces the utility of reply and response as a factor mitigating the extent of injury by communication.

The third, or middle class of options rely on compulsory or social insurance to perform the financial responsibility functions just discussed. Uniformity of the requirement, eliminating the option of satisfying it with assets, would bar price discrimination against the

no-asset originator and insure that all originators contributed to the compensation pool. A deductible feature could be employed to make certain that the originator himself participated in discharging the burden occasioned by his injury. And experience-rating abuses could be minimized by permitting the originator to defend his own lawsuits, backed by a guaranty of a realistic dollar amount for the expenses of defense. The distinctive feature of social insurance, however, would be a public commitment to subsidize the costs of such insurance to the extent that they exceeded a maximum deemed consistent with broad accessibility. If that maximum were realistically low (which is to say, if the commitment to public subsidy were sufficiently high), the essential characteristics of a maximum-access system could be preserved. Whether that condition was met, however, would annually turn on the size of a legislative appropriation, and social insurance may prove to be a slender reed upon which accessibility should have to rely.

IV.

Many of advantages of electronic communication by cable make them most susceptible to privacy abuse. For example, the capacity to classify subscribers demographically for targeting selected broadcasts will induce the storage

of some personal information, such as preferences for minority taste broadcasts, that not all would wish widely disseminated. Unlimited advertiser-originator access to these classifications may create the electronic equivalent of today's problem of "junk mail," which some postal patrons see as an invasion of privacy. The capacity to record which receivers actually were turned in to every broadcast will be useful to originators and essential for billing; but it will again store personal information that ought not to be communicated for unauthorized purposes. Records of commercial transactions, like present commercial banking records (but more so), can become the source of privacy abuse. And the delivery of first class mail electronically, like the present day use of the telephone, affords ideal opportunities for invasion of privacy. All of these exposures are enhanced by enlarged originator and subscriber access. The originator gains some access for legitimate audience selection and subscriber billing purposes. The subscriber contracts for access to computer memories. While in the originator's case some data can be required to be reduced to statistical summaries, some operators will nevertheless yield the raw data under pressure. In the case of the subscriber who is probing computer memories, code devices will undoubtedly be employed to shield from his inquiry those data to which he is not entitled; but such devices cannot be foolproof. Codes to limit access to data can be no more effective than cryptology; whoever has the talent to create

the most difficult code is likely to possess the talent to break any equally difficult one. Most of the elements of an Orwellian nightmare are present in the electronics era of the near-term future, and the access-oriented cable system will exacerbate many of them.

But there is a corresponding advantage to maximum-access cable communications. The potential for privacy invasion is present in any cable system; access only enlarges the number of people who are given the facilities for abuse. Protection of privacy will continue to be a stepchild of the law so long as it is seen to be the other man's problem. But the cable system with universal subscriber access will make it everyone's problem. No longer seen to be the concern only of those who wish to hide from official search, privacy will become the concern of all who would rather not expose some parts of their lives to just anyone's search.

Viewed as an essentially universal problem, privacy can be enhanced by developing legal concepts. Such was the accomplishment of the intricately developed law of property in pre-twentieth-century Anglo-American law. Legal norms do enjoy widespread observance when they are widely perceived as essential to the resolution of common problems. The protection of privacy in the electronic age requires the development of many new norms.

For example, the concept of property in data about oneself, though requiring much refinement, could serve many useful purposes. Were the retrieval of electronically stored data having any privacy overtones legally required to be accompanied by an electronic record of who did so and through what access console, and were the "owner" of that data to have access to such records, a number of property-type remedies could be made available to the owner for rectifying abuses. The technology for making such a record could be defeated, just as anyone may trespass in stealth, but the legal norms could gain such wide acceptance as to reduce materially the incidence of that kind of electronic tampering. Similarly, the concept of property in personal information could undergird a right of access to such data when held by others -- for the purposes of withdrawing from electronic storage data no longer required by others and of correcting data erroneously gathered.

What I have said on this subject amounts to no more than a preface to a book that is required to deal with it -- and that book is being written by Professor Alan Westin. 22/ For purposes of an inquiry into problems of access to the medium of cable, it may be possible to do no more than note that enlarged access will surely enlarge the opportunity for invasions of privacy; but any cable system will provide the opportunity.

V.

Some kinds of injury may flow from the maximum-access system that do not require the foregoing kinds of analyis to deal with them. For instance, accessibility may well increase the risks of unlicensed appropriation and exploitation of copyrighted material. But a requirement of log maintenance for all originations should provide as much protection to owners of proprietary material as the system is practicably capable of affording.

The very openness of access provided in the model here discussed has materially influenced the weight assigned to various risks analyzed in the discussion. This is primarily because I share the assumption on which the constitutional quarantees of freedom of expression are premised: that the quite considerable hazards of free speech and press are best dealt with where ideas compete and the harm of "corrupt" and "misleading" voices will be diluted by different ideas from diverse sources. Messages that might be intolerable in a limited access system, have been assigned a lower order of hazard by me because the prospective system offers almost unlimited opportunity for others to compete with them and to respond.

Though I believe my bias descends from a hallowed tradition, it suggest a special kind of caveat. Like the science of ecology, my assumptions are interdependent. To reduce accessibility at one point may increase the risks at another. Factors other that those discussed in this paper will affect decisions about the structure, and therefore, it is only fair to warn that another order of hazard might be assigned to these risks by observers who contemplate a less accessible medium.

Footnotes

1/ The Village Voice, February 11, 1971, p. 12.

2/ See, e.g., Lacy, FREEDOM AND COMMUNICATIONS, Univ. of Ill. Press, 1961, passim.

3/ Most of the elements of the hypothetical model have been taken from Owen, "Public Policy and the Emerging Technology in the Media," Public Policy, Summer 1970, pp. 539, 544-47. The proposal to maximize competition among cable operators within the structure, however, is taken from Melody, "Market Structure and Public Policy in Communications," Address at the Transportation and Public Utilities Session of the American Economic Association, New York City, December 28, 1969. And the proposal to require 100% subscriber connection for essentially all services other than sports and entertainment was first made by Dean in Testimony on behalf of the City Club of New York, Hearings before the Board of Estimate, New York City, July 23, 1970. See also Industrial Electronics Division, Electronic Industries Association, "The Future of Broadband Communications," Comment on FCC Docket No. 18397, Part V, Oct. 29, 1970.

4/ See United States v. Paramount Pictures, 334 U.S. 131 (1948) which Bruce M. Owen credits with responsibility for a "flowering of viable independent movie producers." Owen, op. cit. supra, note 3.

5/ One major cable operator recently asserted that it would be economically viable for the operator to subsidize 100% hookup wherever he could achieve 90% paid penetration. "We have found little or no resistance to $5 per month. ... Our biggest problem is people who say, 'Well, we are getting these channels just as you do,' but once they see how these channels could look they are amazed at how they ever accepted for all these years the other [off-the-air] reception." Irving Kahn, Testimony before the FCC en banc, Hearings on the Cable Dockets, March 11, 1971.

6/ See [Federal Communications] Commission Policy on Programming, 25 Fed. Reg. 7291 (1960), 20 R.R. 1901; Henry v. FCC, 302 F.2d 191 (1962), cert. denied 371 U.S. 821 (1962).

7/ See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

8/ Rules of the FCC, 32 Fed. Reg. 10303 (1967), as amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362 (1968).

9/ Communications Act of 1934, as amended, Section 315, 47 U.S.C.§315.

10/ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

11/ See, e.g. Committee for the Fair Broadcasting of Controversial Issues, FCC 70-881, Aug. 18, 1970; Donald A. Jelinek, 24 FCC 2d 156 (1970); Mrs. Madalyn Murray, 40 FCC 647 (1965).

12/ See, Dorothy Healey, 24 FCC 2d 487 (1970).

13/ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

14/ At least one state has extended to newspapers the obligation now familiar in broadcast regulation to provide victims of personal attack a right to reply. Nev. Rev. Stat. Section 200.570 (1968).

15/ The injuries contemplated in this Part are those such as defamation, fraud, incitement to illegal conduct, dissemination of gambling and other illegal information, sedition and pornography, where the law subjects expression to civil remedies or criminal sanctions. Many observers will find injury to have been done by other classes of communication, such as violence in television entertainment or the distortion of popular perception of public issues, that they view as being of least as serious as these legally cognizable ones. But the risk of such injuries has not been included within the scope of this paper, primarily because it is not one enhanced by enlargement of access to communications media; on the contrary accessibility should promote the likelihood of diversity and response, the only legally acceptable means of remedying or reducing the impact of such injuries. In addition, of course, the scope of the paper would become too broad to be useful if it were to try to anticipate the potential for injury in fields where one man's meat may be the next man's poison.

16/ In the case of the "little" newspaper, the proportionate investment may be that of the printer, rather than the publisher, but even when printing is contracted out, the printer retains control over, and civil liability for, content.

17/ See footnote 13.

18/ 376 U.S. 254 (1964); see also Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and Note, "Privacy, Defamation and the First Amendment: The Implications of Time, Inc. v. Hill," 67 Col. L. Rev. 926 (1967).

19/ The problems of dealing with violence in many different cities, often simultaneously, were faced in the summer of 1967 and studied in depth thereafter. In the eyes of responsible observors they were scarcely to be viewed as products of the abuse of a communications system. However communication -- by newspaper, magazine, radio and television -- certainly influenced events and in the ensuing public discussion proposals for restraint in news reporting were developed. The most definitive study, the Report of the National Advisory Commission on Civil Disorders, on the other hand, assigned to the system of mass communications a wholly different kind of responsibility for the violence; exclusion of minority views from the mass media, rather than coverage by them, was viewed by the Kerner Commission as being a contributing cause of the 1967 disorders. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, Bantam Books ed., 1968, Chap. 15.

20/ See, e.g., Yates v. United States, 354 U.S. 298 (1957); Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION, Random House, 1970, pp. 97-160.

21/ See pp. 15-18, above.

22/ Westin, COMPUTER DATA BANKS AND CIVIL LIBERTIES, probably to be published in June, 1971, by The New York Times.